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Supreme Court, U.S.
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No. 06-2

IN THE

Supreme Court of the United States

AUTHENTIC HANSOM CABS, LTD., PETITIONER

v.

ALAN NISSELSON, TRUSTEE FOR THE CHAPTER 11 ESTATE OF JOHN FAYOLLE AND RIVERBANK LANDSCAPE, LTD., FRANK SINATRA, TRUSTEE FOR THE CHAPTER 11 ESTATE OF ARISTOCRATIC COACH CORP., ANCHOR PAPER STOCK CO., INC., AND 504 WEST 38 L.L.C.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After *Jones v. Flowers, 126 S.Ct. 1708* (2006), is the procedure set forth in *Rule 7004(b), Federal Rules of Bankruptcy Procedure* unconstitutional because it does not require a court-appointed Trustee to affirmatively take any additional efforts when a mailed notice is returned undelivered before taking the property in deviation with the rules of civil procedure thereby liberalizing the requirement of notice under the due process clause?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 29.6, Petitioner, through undersigned counsel, states that there is no parent corporation related to it, and that no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

In the decision below, the United States Court of Appeals for the Second Circuit, sitting en banc, Ordered that said petition for rehearing was denied. By upholding the opinions below, the Second Circuit continues a deep conflict among the federal bankruptcy courts concerning the application of *Rule 7004(b), Federal Rules of Bankruptcy Procedure* as it concerns due process with regard to mailed notice. Moreover, the decision is also in conflict with this Court's precedents, in particular with the recent decision of *Jones v. Flowers* 126 S.Ct. 1708 (2006)[1]. The question presented, which arises often in the context of bankruptcy proceedings, is of national and public importance given the marked increase in bankruptcy filings in recent years and the overhaul of the Bankruptcy Code and filing procedures that went into affect in October 2005.

Petitioner Authentic Hanson Cabs, Ltd. Petitions this Court to review the judgment below, resolve the conflict among the federal bankruptcy courts, and provide bright-line certainty to litigants involved in bankruptcy proceedings, trustees, creditors, debtors, and courts across the country regarding the notice requirement to comply with the due process of the United States Constitution.

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[1] The *Jones* v. *Flowers* decision was rendered approximately one month after the Second Circuit's decision below. The Petitioner suggests that if the *Jones* decision was rendered prior to the decision below, then using the Supreme Court's analysis and holding, the outcome would have been different.

OPINIONS BELOW

The decision of the United States Bankruptcy Court Sothern District of New York, dated September 2, 2003, in an adversary proceeding commenced by Authentic Hansom Cabs, Ltd (Case Nos. 02-3115) is the first published decision. The opinion of the United States Court of Appeals for the Second Circuit is published as of December 29, 2004. Authentic Hansom Cabs, Ltd. v. Nisselson (In re Fayolle), Nos. 05-0511-bk (L); 05-0672-bk (CON), United States Court of Appeals for the Second Circuit , 159 Fed. Appx. 221; 2005 U.S. App. LEXIS 27945, December 15, 2005.

JURISDICTION

The decision of the judgment of the United States Court of Appeals for the Second Circuit was entered on December 15, 2005. Petitioner timely sought a rehearing en banc, which was denied on March 31, 2006. This Court has jurisdiction under 28 U.S.C. § 1257. The Petition for Writ of Certiorari is timely filed.

RELEVANT PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law [.]"

The Fifth Amendment to the United States Constitution states in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law [.]"

STATEMENT

A peculiarity of bankruptcy courts is that, unlike other state and federal courts, bankruptcy courts permit service of process by regular first-class mail. In addition, this service by mail does not require actual receipt of the mailed notice. The presumption has been that, if the mail is addressed properly, is stamped and put in a mailbox, then the mailing has been made and notice has been perfected. Rule 7004(b) does not require the recipient to sign an acknowledgment of service.

However, denial of receipt is not sufficient to overcome the presumption that the party did not receive the mailed notice. In conflict with other federal and state courts, even if there is no acknowledgement to the letter, the bankruptcy court may still draw the inference that the notice was received and due process met.

Confusion arises when certain elements of the mailing are defective, such as an incorrect or

incomplete address as in the instant case. Rule 7004(b)(3) is conspicuously silent concerning the proper address for mailing service.

The absence of procedural due process guidance as to proper service can have disastrous consequences, as which occurred in the facts as stated below. Several times during the course of the proceedings below, Petitioner Authentic Hansom Cabs, Ltd., ("Authentic") objected that its procedural due process right of notice had been violated when Authentic did not receive timely notice of an impending termination hearing that resulted in deprivation of its property because the Trustee did not properly address the certified mail notice, even though on prior occasions the Trustee had sent notices to the correct address. Moreover, the Court-appointed Trustee *knew* that his initial effort to provide notice by certified mail had failed because there was no signed confirmation of receipt.

Under the circumstances, a reasonable person in the Trustee's position of responsibility actually desiring to provide notice would have resent the notice by regular mail, as is the standard under 7004 (b) and send the notice to Petitioner's attorney of record. Such minimal and reasonable efforts would have resulted in effective and timely notice to Authentic without undue burden. The court-appointed Trustee knew the Petitioner's correct and complete address since he had used it in prior notifications. Because the court-appointed Trustee made no effort to attempt to provide actual notice to Authentic following the return of its single mailed effort at notice, Authentic was prejudiced and loss its property. The Trustee violated the Petitioner's due process rights under the Fourteenth

and Fifth Amendments by failing to take additional reasonable steps to notify Authentic of the imminent loss of its property.

There was no due diligence required of the Trustee to confirm that Authentic received notice. The impact of the lower courts' decisions are in direct conflict with the Constitution. Public policy and due process mandate proper notice. If the Bankruptcy Courts adopt its own set of rules regarding notice, then the end result will be drastic.

This case is ripe for this Honorable Supreme Court to rectify the conflict among the federal courts and between the federal and bankruptcy courts as to what constitutes proper notice. This Court must extend the *Jones* analysis and holding to bankruptcy proceedings.

A. Factual Background

On May 15, 2000, involuntary bankruptcy petitions were filed against John B. Fayolle ("Fayolle"), Riverbank Landscape, Ltd. ("Riverbank"), and Aristocratic Coach Corp. ("Aristocratic"). Riverbank was 100% owned by Fayolle and Aristocrat was 50% owned by Fayolle and 50% by Fayolle's father. Those two entities owned the fee title to two valuable pieces of real estate. Aristocratic owned fee title to 634 West 52nd Street, New York, New York, (the "Aristocratic Premises") in which Fayolle, as vice president of Authentic, operated a stable for carriage horses as tenant of Aristocratic under a 10 year lease. A second property, adjacent to the Aristocratic Premises, was

639-41 West 51st Street, ("Riverbank Premises"), and was owned by Riverbank. As a principal in Riverbank, Fayolle caused the Riverbank Premises to be leased to Hudson River Lounge, LLC ("Hudson") which for a short time operated a now defunct Cabaret Club at the Riverbank Premises. Hudson, as was Authentic, is a non-bankrupt entity.

Throughout these proceedings, the Riverbank Premises and the Aristocratic Premises, which are adjacent to one another, were jointly referred to as the "Blockfront Properties."

In addition to the Blockfront Properties, Fayolle had a lease for the entire building at 504-506 West 38th Street in New York City, wherein he was tenant in his individual capacity. This lease contains a critical option to purchase the Sublet Property (the "Anchor Lease" or the "Overlease"). Fayolle entered into the Anchor Lease in November of 1997 directly with Anchor Paperstock Co., Inc. ("Anchor"). By operation of the May 15, 2000 involuntary filing against Fayolle, the leasehold became property of the Fayolle Trustee. Mr. Nisselson, the Fayolle Trustee, decided that the Riverbank and Aristocratic Premises would be better marketed as a package (the "Blockfront Properties"). An agreement was reached (the "Hudson Settlement Agreement") whereby Authentic and Hudson both agreed to surrender their respective leases on the Blockfront Properties, thereby freeing up the Blockfront Properties for sale as a package by the respective trustees. Both Hudson and Authentic agreed to relinquish its valuable leasehold rights in order to afford Authentic to have a place to move the horse stables, which was an ongoing business, and

retained the valuable purchase option to the 38th Street Property.

Two agreements resulted, the Hudson Settlement Agreement and the contemporaneous, related Sublease involving the 38th Street Property. In reviewing the Bankruptcy Court's decision, this Court should not lose sight of the substantial consideration Authentic paid for the Sublease.

On November 22, 2002, the Fayolle Trustee assigned the Anchor Lease to 504 West 38th Street LLC, which is an entity controlled by Rockrose Development Corp. (504 West 38th Street LLC is hereinafter referred to as "Rockrose") free and clear of all encumbrances, but expressly subject to the rights of Authentic under the Sublease. The adversary proceeding was instituted in Bankruptcy Court by Authentic for a declaration that Authentic's Sublease was and remains, in all respects, valid, and that the Fayolle Trustee's purported termination of the Sublease was ineffective and invalid.

Thus, the real parties in interest at this time are Rockrose, who had purchased the 38th Street Lease from the Fayolle Trustee, and Authentic, who had surrendered its valuable leases to the two Blockfront Properties solely to relocate the horse stables to that property and retain the right to exercise the purchase option under the 38th Street Lease from Anchor (the "Purchase Option"). The competing desire of both Rockrose and Authentic to control the right to exercise the Purchase Option at an extremely favorable price is the focus of the dispute.

In a twenty-three page Decision, Judge Robert D. Drain of the Bankruptcy Court for the Southern District upheld the purported termination of Authentic's Sublease interest, thereby not only causing a forfeiture of the balance of the term, and Authentic's ability to relocate its ongoing Hansom Cab horse stables, but also causing it to lose its valuable purchase option.

Authentic Hansom Cabs, Ltd. clearly stated that the Termination letter sent by the Trustee was defective and invalid. In this case, the Court-appointed Trustee *knew* that his initial effort to provide notice by certified mail had failed. Under the circumstances, a reasonable person in the Trustee's position of responsibility actually desiring to provide notice would have resent the notice by regular mail, and sent the notice to Plaintiff-Appellant's attorney of record. Such minimal and reasonable efforts would have resulted in effective and timely notice to Authentic Hansom Cabs, Ltd. without undue burden because Authentic Hansom Cabs, Ltd. correct and complete address was readily available and the Trustee had used it in prior notifications. Because the court-appointed Trustee made no effort to attempt to provide actual notice to Authentic Hansom Cabs, Ltd. following the return of its single mailed effort at notice, the Trustee violated the Plaintiff-Appellant's due process rights.The Trustees failure to take reasonable steps to notify Authentic of the imminent loss of its property, is the ket issue of this case. Has the Trustee simply followed the notice provision in the Sublease itself, Authentic would have received proper notice. The Notice provision of the Sublease clearly requires that all communications shall be sent to "Sub lessee at 105

West 55th Street, **Suite 8D**, New York, New York 10019, Attention John Fayolle (emphasis added). Neither the certified letter nor the return receipt designates a Suite, Room or Floor number. There are more than 70 units in the residential building at 105 West 55th Street and the building has no doorman or concierge service. Thus it was inevitable that the letter would be returned "Unclaimed." That is why the suite number was made part of the notice provision in the first place, because the Trustees wanted to make sure that any notices would be properly served.

A closer look at the language of the termination letter will show that the Trustee overreached his authority by instantly terminating the Sublease. The termination letter states that the "Sublessor has elected to terminate the Sublease, effective as of 11:59 P.M., July 31, 2002." As of April 6, 2002 the Trustee (Sublessor) became a landlord under the Real Property Laws of New York. Thus, the Trustee was required to follow the letter of the law as any other Landlord in New York would have to abide by in the process of terminating and evicting a tenant. In Authentic's situation, the very life of its ongoing Livery Stable business for the carriage horses of Central Park was at stake. The magnitude of the termination letter was improperly ignored by the Trustee. Authentic's property and records remain at the 38th Street property to this day.

Moreover, as a Federal Court appointed Trustee, it would be assumed that Trustee Nisselson would have to follow the letter of the law as any other Commercial Landlord would. After all, Authentic paved the way for the Trustees' to sell the Blockfront by extinguishing

close to five (5) years of its lease at the Aristocratic property. Authentic did so in exchange for continuing its Livery business at 38th Street.

When the Trustee sent out the termination letter and immediately "elected" to terminate the Sublease, he irresponsibly overlooked that Authentic had given up valuable consideration for this Sublease and lived up to its end of the deal by vacating the blockfront so that Trustee could sell it free and clear of all encumbrances. If Authentic was to be correctly evicted from the property, the Trustee should have properly served notice to its tenant. Authentic's livelihood was taken away without the due recourse or the due process it should have been afforded.

B. Procedural Background

The decision of the Honorable Judge Robert D. Drain from the United States Bankruptcy Court Sothern District of New York, dated September 2, 2003, in an adversary proceeding commenced by Authentic Hansom Cabs, Ltd (Case Nos. 02-3115) is the first appealed decision. This decision was later affirmed by the Honorable Judge George B. Daniels, of the United States District Court Sothern District of New York (Case Nos. 03 CV 9468). The case was appealed to the United States Court of Appeals for the Second Circuit, which decision was also affirmed on December 29, 2004. Authentic Hansom Cabs, Ltd. v. Nisselson (In re Fayolle), Nos. 05-0511-bk (L); 05-0672-bk (CON) , United States Court of Appeals for the Second Circuit , 159 Fed. Appx. 221; 2005 U.S. App. LEXIS 27945, December 15, 2005.

REASONS FOR GRANTING THE PETITION

I. The Decisions Below Deepen the Conflict Over a Recurring Question of National Importance.

A. The Bankruptcy Courts are Split.

In *Fleet Credit Card Servs. v. Tudor (In re Tudor)*, 282 B.R. 546 (2002), the Honorable John S. Dalis, Chief United States Bankruptcy Judge, has noted the conflicts in the courts regarding the application of 7004(b) with regard to procedural due process.[2]

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[2] "Courts are divided as to whether notice may be addressed simply to an unspecified officer or agent or if the notice must be addressed to an named individual. *Schwab v. Associates Commercial Corp. (In re C.V.H. Transport, Inc.), 254 B.R. 331, 332 (Bankr. M.D. Penn. 2000).* Fleet relies upon *Addison v. Gibson Equipment Co., Inc. (In re Pittman Mechanical Contractors, Inc.), 180 B.R. 453 (Bankr. E.D. Va. 1995),* holding that because "nationwide service of process by first class mail was a rare privilege," notice addressed to "President or Corporate Officer" was improper because no individual was named. *Id. at 454, 456-57,* citing In re *Schoon, 153 B.R. 48, 49 (Bankr. N.D. Cal. 1993).* Other courts have held that addressing notice to "officer" or "agent" meets the literal requirements of Rule 7004((b)(3). *In re C.V.H. Transport, Inc., 254 B.R. at 333.* In C.V.H. Transport, the debtor mailed a summons addressed to an "officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process Associates Commercial Corporation." *Id. at 332.* The *C.V.H. Transport* court reviewed the advisory committee notes for prior bankruptcy rule 704(c), which is nearly identical to the current Rule 7004(b)(3). These advisory notes state that notice may be "'directed to the attention of the officer or agent by reference to his position or title.'" *Id. at 333.* The 1999 advisory committee revisited the issue and decided that "'requiring parties to name an officer, director, or managing agent would create more problems than it would solve.'" *Id.* Relying on these comments the C.V.H.

The question presented is whether, after *Jones v. Flowers*, the procedure set forth in *Rule 7004(b), Federal Rules of Bankruptcy Procedure* is unconstitutional because it does not require a court-appointed Trustee to make any additional efforts when a mailed notice is returned undelivered before taking the property.

The United States Supreme Court in *Jones v. Flowers*, reversing the Arkansas Supreme Court decision in *Jones v. Flowers*, 359 Ark. 443, 2004 WL 2609800 (2004), cert. granted, 126 S. Ct. 35, 162 L. Ed. 2d 933 (U.S. 2005) and rev'd and remanded, 2006 WL 1082955 (U.S. 2006), held that the government must take additional reasonable steps to provide notice of a tax sale of real property when notice of the sale is mailed to the owner and returned undelivered. The petitioner purchased a house and resided there with his wife until their separation, when he moved elsewhere in the city. After moving, the petitioner failed to notify the property tax collector of his new address. After the mortgage was paid off, the property taxes went unpaid, and the property was certified as delinquent. In an attempt to notify the petitioner that the property would be subject to tax sale in two years unless redeemed, the state sent a certified letter to the property's address, which was returned unclaimed. Two years later, the state

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Transport court held that addressing an officer or agent by title is sufficient. *Id. at 334*. I am persuaded by the reasoning of C.V.H. Transport. In the instant case, the Debtor met the requirements of Rule 7004(b)(3) by mailing notice to the attention of "Managing Agent."" *Fleet Credit Card Servs. v. Tudor (In re Tudor)*, 282 B.R. 546, 549-550 (2002)

published a notice of public sale, and after negotiating a private sale when no bids were received, mailed another certified letter to the address, which was also returned unclaimed. The Arkansas courts rejected the petitioner's claim that the Commissioner of State Lands had failed to provide adequate notice, finding that the notice provisions of the Arkansas tax sale statute comported with due process.

Writing for the Supreme Court, Chief Justice Roberts in an opinion joined by three other members of the Court held that when a mailed notice of tax sale is returned unclaimed, the state must take additional reasonable steps in an attempt to provide notice before selling the property, if it is practicable to do so. The Chief Justice noted that, since *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)*, the Supreme Court has held that notice is constitutionally sufficient if reasonably calculated to reach the intended recipient when mailed, but the Court had never addressed whether due process requires further efforts when the state becomes aware prior to the taking that the attempt to provide notice has failed.

Most courts that have addressed the latter issue have found that the state must do more. Under *Mullane*, the means chosen to provide notice must be "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." The adequacy of the particular form of notice is judged under a balancing test that weighs the state's interest against that of the individual interest protected by the Fourteenth Amendment, the Chief Justice said. In the case at bar, the state may have

made a reasonable initial calculation of how to reach the petitioner. Given that an individual was unlikely to do nothing when faced with the prospect of losing his home, however, the state had reason to suspect after the certified mail was returned unclaimed that the petitioner was no better off than had no notice had been sent. The Chief Justice rejected the dissent's dismissal of the state's knowledge that its notice was ineffective as "learned long after the fact." The notice letter, the Chief Justice noted, was promptly returned to the state two to three weeks after it was sent, and the Arkansas statutory regime precluded the state from taking the property for two years during the period in which the property owner could exercise a right to redeem.

The government must consider unique information about an intended recipient regardless of whether the statutory scheme is reasonably calculated to provide notice in the ordinary case. Because the state's chosen procedure promptly provided additional information about the effectiveness of the notice, it did not contravene the principle that the constitutionality of notice is judged ex ante to consider what the state did with that information. Nor was the state relieved of its constitutional obligation to provide notice by the property owner's failure to meet his legal obligation to keep his address updated or his obligation to ensure that those occupying the property would alert him if it was in jeopardy. Because additional reasonable steps were available to the state, the Commissioner's efforts were insufficient to satisfy due process. What is reasonable in response to new information is dependent upon what the new information reveals. Here, the return of the mail as

unclaimed suggested that the owner was not home when the mailman attempted delivery and did not attempt to claim the letter at the post office or that the owner no longer resided at the address. In the first scenario, the state might have reasonably attempted to resend the notice by regular mail, increasing the chances of actual notice. Other possibilities were to post notice on the home or to address otherwise undeliverable mail to "occupant." The state was not required to search the local phone book and other records for alternative addresses for the owner, as that would impose significantly greater burdens than other easier options. The Court would not prescribe a form of service, however, as the state might best determine how to proceed. *Id.*

The notice analysis and constitutional argument related thereto are crucial to the present Writ before this Honorable Court. It is suggested that with tax lien cases, foreclosures, and civil cases there is a stringent and uniform standard as to what is proper notice. However, the Bankpruptcy Courts and the bankruptcy rules dilute the constructive notice requirements as established in *Flowers* and *Mullane*. Instead, the bankruptcy courts design their own notice rules; there is conflict among the bankruptcy courts as well as between different courts within the federal judicial system. The importance of notice and due process must be in conformity no matter which court the matter is pending.

For instance, Rule 7004(b)(3) is silent concerning the proper address for mailing service, and as a result there has been a wide variance in the application of this rule in bankruptcy proceedings. *See generally* Dave

Baddley, *Are You Paying "Attention" when Serving Contested Matters under Bankruptcy Rule 7004(b)(3)?* 24-2 ABIJ 46 (2005) (noting that "some courts find that *any* service under Rule 7004(b)(3) may be mailed to the address provided on the proof of claim (even if no officers or agents are located at that address) unless the claim has been withdrawn" while other courts "disagree on whether a post office box utilized by a creditor to receive payments is a proper mailing address for service under Rule 7004(b)(3).").

In the context of bankruptcies, "[t]he result is that too many practitioners are merely providing *notice* of contested matters when, in fact, *service* is required." *Id.* at 46. This leads to unsettling practices. For example, in determining whether a motion was properly served, the United States Bankruptcy Court For the Northern District Of California in *In re Schoon*, 153 B.R. 48 (1993), found that "the method of service employed by the debtors does not meet the requirements of Rule 7004(b)(3), and fails to meet minimum due process requirements" because the debtors had failed to add the name of the president of the corporation. If failing to add the name of the officer in the ATTN line of the address fails to meet minimum due process requirements, then surely an incomplete address fails the same test and for the added reason that it makes service unlikely, if not completely impossible. In contrast, the Eleventh Circuit in *In re Coggin*, 30 F.3d 1443, 1450 n.8 (11th Cir. 1994), held that "service is effective on a debtor even if mailed to the wrong address, if the address to which it is mailed is the last listed by the debtor in a filed writing. Service of the debtor and his attorney should, therefore,

generally present no difficulty to a movant and should be completed at the same time as filing, prior to the expiration of the bar date." *Id.* Relying on *Coggin*, the United States Bankruptcy Court for the Western District Of Arkansas, Hot Springs Division in *Edwards v. Goforth (In re Goforth)*, B.R. 560, 562 (1995), held that "[s]ince neither certified nor restricted delivery nor personal service is required, the fact that plaintiffs' "green card" was not returned is of no import."

Further confusion arises as to whether and when first-class mail service is sufficient. In *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (2004), the United States Bankruptcy Appellate Panel For The Ninth Circuit held that "service to Beneficial's post office box does not comply with the requirement to serve the Motion to the attention of an officer or other agent authorized as provided in *Rule 7004(b)(3).*" But in *Depaola v. Burger King (In re Collins Signs, Inc.)* 2004 Bankr. LEXIS 2238 (December 23, 2004), the United States Bankruptcy Court For the Middle District Of Alabama held that "[i]f the defendant is a corporation, service may be made by first-class mail as set forth in *Rule 7004(b)(3), Fed. R. Bankr. P.).*" A year later, the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division in *In re Contreras-Guzman*, 2005 Bankr. LEXIS 560 (2005) held that "[t]he objection to the proof of claim was not properly served on the claimant because it was mailed by regular and not certified mail.(...) Therefore, service was incomplete and the respondent was not properly before the court."

These procedural inconsistencies create a harrowing legal landscape for all actors in bankruptcy cases, and this Court must provide clarification in light of its recent decision in *Jones v. Flowers.*

JUST REITERATE BRIEFLY YOUR NOTICE ISSUES HERE AND WHY THE DECISION WOULD BE DIFFERENT GIVEN THE RECENT CASE.

Furthermore, the recent *Jones v. Flowers* holding and interpretation have already been upheld and extended.

See *Estate of Lowe ex rel. Harris v. Apex Tax Investments, Inc.*, 126 S.Ct. 2287, 74 USLW 3437 (May 22, 2006) (On petition for writ of certiorari to the Supreme Court of Illinois, the Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Illinois for further consideration in light of *Jones v. Flowers*, 126 S.Ct. 1708 (2006)); *U.S. v. Williams*, 2006 WL 1582152 (M.D.Fla., June 2, 2006) (using the *Jones v. Flowers* holding in a forfeiture determination case, the District Court held that notice using certified mail to the complainant's residence, to her attorney, and to her business were taken as a whole was reasonably calculated to inform the complainant of the pending forfeiture proceedings met the *Jones v. Flowers* due process standard); *Equity One, Inc. v. City of Pittsburgh*, 2006 WL 1509334 (W.D.Pa) (the District Court of Pennsylvania extended the *Jones v. Flowers* holding to a claim under the Civil Rights Act of 42 U.S.C. §1983 where a mortgagee had to comply with

notice requirement prior to condemnation or demolition proceedings).

Given the clarification of the notice requirements mandated under the recent Supreme Court decision as well as its extension to other cases, the same requirements must be upheld for bankruptcy proceedings as well. Therefore, this Writ must be granted. Or, the Petitioner suggests that this Court remand the case so that the Second Circuit and/or Bankruptcy Court may determine whether the notice issue is in compliance with *Jones v. Flowers*.

B. The Question Presented is of Exceptional National Importance and Requires This Court's Intervention

According to the statistical tables for the Federal Judiciary compiled by the Administrative Office of the U.S. Courts, the number of bankruptcy cases filed in the United States rose an average of 5.2 percent per year between 2000 and 2005. Forty-five out of fifty states reported increases in bankruptcy cases. Even in states that experienced a decrease in population during that time, such as North Dakota, bankruptcy filings increased. Some states, like Colorado, Iowa, Michigan, Nebraska, Ohio, and Wisconsin experienced double-digit increases while other states like Arkansas, Texas, and West Virginia experienced an over 9% increase in bankruptcy cases. In 2005 alone, there were 1,637,254 cases filed nationally.

Given the national importance of this question, the continued division among the courts is intolerable. The consequences on the lives of citizens in every state are enormous. Legal actors in bankruptcy proceedings

in one state may obtain a significantly different judgment on the same question of proper service than legal actors similarly situated in another state. This situation, if allowed to persist, leads to inconsistencies and inequalities as to depravation of property dependent simply upon an actor's domiciliary state.

In addition, federal and state courts have reached different conclusions about due process notice requirements in bankruptcy cases in the *same* state. The Honorable John Q. Squires of the Bankruptcy Court for the Northern District of Illinois has observed this dissonance that results in "a number of persistent common practice errors." Judge Squires notes this illustration: "Federal Rule of Bankruptcy Procedure 7004(b)(9)2, however, mandates that both the debtor and the debtor's attorney must be served by mail at the proper address of record for any matter which may affect the debtor's interest. This is in marked contrast to practice in the Illinois state courts, which requires service only on the attorney of record."[3] The harm done by this due process confusion to all legal actors involved in bankruptcy proceedings is unacceptable. Constitutional due process notice requires consistent application in all courts, and this Court must define constitutionally adequate procedures for due process notice to all parties involved in bankruptcy cases.

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[3] The Honorable John Q. Squires, "Fifteen Common Bankruptcy Practice Errors and How to Avoid Them." DCBA Brief Online (June 1998). http://www.dcba.org/brief/judpractice/0698.htm (Retrieved 6-18-06)

II. The Decisions Below Are in Conflict with This Court's Precedents and Are Erroneous on the Merits.

This Court should grant certiorari because the decisions below are in conflict with this Court's prior decisions regarding constitutional due process regarding mailed notice. In *Mullane*, the Court noted that the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest," *Mullane, supra.* In *Greene v. Lindsey*, 456 U.S. 444, 451 (1982), the Court noted that:

> [t]he sufficiency of notice must be tested with reference to its ability to *inform* people of the pendency of proceedings that affect their interests. In arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, "its effect must be judged *in the light of its practical application to the affairs of men as they are ordinarily conducted.*" *North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925).* [Emphasis added]

The enumerated procedural due process right to timely notice of an impending judicial proceeding that may lead to deprivation of property is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Most recently, in *Jones v. Flowers*, supra,

this Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 1713.

The same additional reasonable steps to ensure constitutional due process notice must now be applied to bankruptcy cases. The Trustee has a corresponding obligation to use reasonably diligent efforts to *actually intend* to hit the target with the notice. Once the sender *knows* that delivery has failed, the sender bears the burden to provide timely notice to inform the recipient, since "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party (...), if its name and address are reasonably ascertainable." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). For notice to be constitutionally sufficient under these circumstances means that a reasonable person in the Trustee's position of responsibility will resend the notice by regular mail, and send the notice to the party's attorney of record. A sent notice that "boomerangs" back to the sender is "mere gesture" according to the *Mullane* standard and therefore constitutionally deficient.

The constitutional provision assumes that the intention of the sender is actually to notify the property owner and not merely to engage in pre-trial posturing. This affirmative intent on the part of the sender to provide notice can be inferred from the sender's conduct once he realizes that his initial attempt has failed. Where the sender takes constructive steps to

make certain that the notice reaches the intended party, intent to notify can be inferred. "We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed." *Jones* at 1716.

That some courts, including the United States Court of Appeals for the Second Circuit, have failed to subscribe to this constitutional principle with regard to bankruptcy cases underscores the importance of granting certiorari in this case. Such minimal and reasonable efforts would have resulted in effective and timely notice to Authentic Hansom Cabs, Ltd. without undue burden to the State. Given the high economic stakes for the Petitioner in this case, there is no question that Authentic would have attempted to cure had it been properly notified of the pending deprivation of property and had the statutory period for curing been made available.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Petitioner respectfully requests that this Court remand the case to the Second Circuit and/or the Bankruptcy Court to determine whether the notice requirement was in compliance with *Jones v. Flowers*, and such other relief that the Court deems just and proper.

Respectfully submitted,

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Nos. 05-0511-bk (L); 05-0672-bk (CON)
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE JOHN B. FAYOLLE, IN RE RIVERBANK LANDSCAPE, LTD., IN RE ARISTOCRATIC COACH CORP. AUTHENTIC HANSOM CABS, LTD.,
Plaintiff-Appellant,

v.

ALAN NISSELSON, TRUSTEE FOR THE CHAPTER 11 ESTATE OF JOHN FAYOLLE AND RIVERBANK LANDSCAPE, LTD., FRANK SINATRA, TRUSTEE FOR THE CHAPTER 11 ESTATE OF ARISTOCRATIC COACH CORP., ANCHOR PAPER STOCK CO., INC., AND 504 WEST 38 L.L.C.,
Defendants-Appellees.

December 15, 2005, Decided

NOTICE: RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: FOR APPELLANT: RICHARD J. PILSON, Berliner & Pilson, New York, NY.

FOR APPELLEES: RONALD S. GREENBERG, Kramer Levin Naftalis & Frankel LLP, New York, NY, for Defendant-Appellee 504 West 38 L.L.C.

ON THE BRIEF FOR APPELLEES: RICHARD J. PILSON, Berliner & Pilson, New York, NY RONALD S. GREENBERG, Kramer Levin Naftalis & Frankel LLP, New York, NY, for Defendant-Appellee 504 West 38 L.L.C. Leslie S. Barr, Brauner Baron Rosenzweig & Klein LLP, New York, NY, for Defendant-Appellee Alan Nisselson, Trustee for the Chapter 11 Estate of John Fayolle and Riverbank Landscape, Ltd. Robert J. Bergson, Abrams Garfinkel Margolis Bergson, LLP, New York, NY, for Defendant-Appellee Anchor Paper Stock Co., Inc. Peter A. Zisser, Holland & Knight LLP, New York, NY, for Defendant-Appellee Frank Sinatra, Trustee for the Chapter 11 Estate of Aristocratic Coach Corp.

JUDGES: PRESENT: JON O. NEWMAN, JOSE A. CABRANES, PETER W. HALL, Circuit Judges.

OPINION: SUMMARY ORDER

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiff-Appellant Authentic Hansom Cabs, Ltd. ("Authentic") appeals from (1) a December 22, 2004 Memorandum Decision and Order of the District Court which affirmed a September 2, 2003 Decision and Order of the Bankruptcy Court (Robert D. Drain, *Judge*), and (2) the District Court's December 29, 2004 Order denying plaintiff's motion for injunctive relief pending the outcome of this appeal. We assume the parties' familiarity with the facts and procedural background of this case.

We consider here whether the District Court correctly affirmed the Bankruptcy Court's judgment that Authentic's sublease (as well as its purchase option) for a building at West 38th Street in Manhattan was properly terminated by the trustees of John B. Fayolle's estate in July 2002 as a result of Authentic's default on rent payments and other financial obligations. Because the facts in this case are essentially undisputed, we review the District Court's legal conclusions *de novo*. *See, e.g.*, United States v. Domino Sugar Corp., 349 F.3d 84, 86 (2d Cir. 2003).

Substantially for the reasons stated by the District Court in its comprehensive opinion, we hold that plaintiff waived all arguments not presented in the proceeding before the Bankruptcy Court, including its novel assertions on appeal (1) that Section 17(2) of the"Overlease Agreement" between Fayolle and Anchor Paper Stock Co. ("Anchor"), which specifies the penalties for default, was not incorporated by reference into the sublease agreement, (2) that its sublease was not properly terminated due to the absence of "a summary non-payment proceeding with its attendant statutory cure period," Pl.'s Br. at 27, and (3) that termination was improper because plaintiff had been in actual possession of the property prior to termination.

With respect to plaintiff's claim that the July 25, 2002 letter of termination failed to provide adequate notice, we agree with the District Court that, even if plaintiff did not forfeit its right to notice of termination, the letter was not defective inasmuch as it "indicated that the termination was for failure to timely pay rent, cited the specific provision of the lease claimed to be violated, and provided the date the lease would be terminated."

Finally, we hold that the District Court did not err in denying plaintiff's request for a stay pending the outcome of this appeal.

* * * *

We have considered all of plaintiff's arguments and found each of them to be without merit. Accordingly, the judgment of the District Court is AFFIRMED.

03 CV 9468 (GBD)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AUTHENTIC HANSOM CABS, LTD.,
Appellant,

-against-

ALAN NISSELSON, TRUSTEE FOR THE CHAPTER 11 ESTATE OF JOHN FAYOLLE AND RIVERBANK LANDSCAPE, LTD., FRANK SINATRA, TRUSTEES FOR THE CHAPTER 11 ESTATE OF ARISTOCRATIC COACH CORP., ANCHOR PAPER STOCK CO., INC., and 504 WEST 38 L.L.C.,
Appellees.

December 22, 2004, Decided
December 27, 2004, Filed

COUNSEL: For Authentic Hansom Cabs, Ltd., Appellant: Ira R. Abel, Kensington & Ressler, L.L.C., New York, NY; Joseph M Vann, Herrick, Feinstein, L.L.P., New York, NY.

JUDGES: GEORGE B. DANIELS, United States District Judge.

OPINION BY: GEORGE B. DANIELS

OPINION:

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, District Judge:

Appellant, a sublessee of a Chapter 11 debtor-tenant, brought an adversary proceeding in the Bankruptcy Court for declaratory judgment regarding the status of its sublease. On summary judgment motion, the Bankruptcy Court, Robert D. Drain, J., held inter alia that the sublease was properly terminated based on Appellant's nonpayment of rent. Appellant appeals the judgment. This Court having carefully considered the briefs of the parties and the record evidence, affirms the judgment of the Bankruptcy Court.

BACKGROUND

Authentic Hansom Cabs ("Authentic"), Sublessee of certain property located at 504-506 West 38th Street in New York City ("38th Street Property"), brought this adversary proceeding in the Bankruptcy Court against Alan Nisselson (the "Fayolle Trustee"), in his capacity as Chapter 11 Trustee of the Estate of John Fayolle, as sublessor. On May 15, 2000, involuntary bankruptcy petitions were filed against John B. Fayolle ("Fayolle"), Riverbank Landscape, Ltd. ("Riverbank"), and Aristocratic Coach Corporation ("Aristocratic"). Both Riverbank and Aristocratic owned fee title to two pieces of real estate. Aristocratic owned title to 634 West 52nd Street, New York, New York (the "Aristocratic Premises"). Authentic, of which Fayolle was Vice President, operated a stable for carriage horses of Central Park at the Aristocratic Premises. Riverbank owned an adjacent property to the Aristocratic Premises, 639-41 West 51st Street (the "Riverbank Premises"). As principal of Riverbank, Fayolle leased the Riverbank Premises to Hudson

River Lounge, LLC, an adult entertainment establishment. The Riverbank Premises and the Aristocratic Premises are together referred to as the "Blockfront Properties." Along with the Blockfront Properties, Fayolle entered into a ten-year lease with Anchor Paper Stock Co., Inc. ("Anchor") for the 38th Street Property, where Fayolle was a tenant (the "Overlease"). At the end of its term, the Overlease provided the tenant with an option to buy the 38th Street Property.

The leasehold became the property of the Fayolle Trustee, who decided to market the Blockfront Properties as a package free and clear of their existing tenancies. The Trustee, therefore, entered into an agreement with Authentic and the Hudson River Lounge freeing up the Blockfront Properties for sale (the "Hudson River Settlement Agreement"). Under the Hudson River Settlement Agreement, Authentic agreed to terminate its lease of the Aristocratic Premises, and Hudson River Lounge agreed to terminate its lease of the Riverbank Premises. In return, the Fayolle Trustee agreed to make two payments to Authentic totaling $ 100,000 under certain specified conditions. n1 By Order dated February 5, 2002, the Bankruptcy Court (Hon. Richard Bohanon, J.), approved the Fayolle Trustee's proposed sale, the Hudson River Settlement Agreement, and the Fayolle Trustee's entry into the Sublease for the 38th Street Property.

Authentic never made any rental payments to the Fayolle Trustee under the Sublease. Additionally, the record does not reflect that Authentic physically occupied the rental property, or even stored its belongings there, as Authentic contends. n2 On August

29, 2002, the roof partially collapsed rendering the rental property uninhabitable. Because of the hazardous condition of the site, access to the premises was barred and the premises remain padlocked. Thus, Authentic has yet to physically occupy, or otherwise affirmatively use, the 38th Street Property.

By letter dated, July 25, 2002, the Fayolle Trustee notified Authentic that "by reason of Sublessee's defaults under the caption Sublease, including without limitation to Paragraph 5 of the Sublease" he chose to terminate the Sublease (the "Termination Letter"). In a letter dated, August 14, 2002, Authentic rejected the termination of the Sublease asserting that the "default/termination notice [was] defective, invalid and inappropriate". The letter further stated that "Authentic disputes, that [it] has defaulted and the Sublease has been terminated." On August 29, 2002, the roof of the 38th Street Property collapsed. The premises were ordered padlocked by the New York City Building Department because it was unsafe.

On September 18, 2002, Authentic brought an adversary proceeding in the Bankruptcy Court, seeking declaratory relief on three claims: a declaration that the Sublease remained in full force and effect; that Authentic had the right to offset monies due and owing from the Trustees against any rent due and owing under the Sublease; and a mandatory injunction compelling the Trustees to immediately transfer and deliver the sum of $ 75,000.00 to Authentic. Appellant and Appellees both before the Bankruptcy Court.

Termination of the Sublease

Paragraph 5 of the Sublease establishes Authentic's monthly rental obligations. n3 It states, with the

exception of rent payments from Sublessor to Overlessor "and any other obligation of Sublessor expressly set forth herein, Sublessor [*6] shall have no obligations of payment or performance under the Overlease, all of the same to be undertaken and paid or performed by Sublessee." Id. According to Paragraph 2 of the Sublease, the Overlease is a part of the Sublease. n4 With regards to Authentic's obligations to the Fayolle Trustee under the Sublease, paragraph 7 of the Sublease states in relevant part:

> For purposes of this Sublease, to the extent that the terms, covenants, and conditions of the Overlease are not herein modified, cancelled or amended, such terms, covenants and conditions on the part of the Sublessor thereunder to be performed, observed or complied with are hereby incorporated herein and made a part hereof with the same force and effect as though set forth at length herein. The said obligations created by the Overlease and incorporated herein by reference, imposed upon Sublessor, are hereby impressed upon Sublessee.

Also, paragraph 17 of the Sublease provides that the "Sublease is and shall be in all respects subject and subordinate to the terms, covenants, conditions and prohibitions set forth in the Overlease" and that "in the event of any conflict between the Sublease and the Overlease, the Overlease shall control."

Paragraph 22 of the Sublease grants the sublessee the option to purchase the 38th Street Property on the

condition that "(a) at the time of Sublessee's exercise of the Option, and at the time of closing of the assignment of the Overlease from Sublessor to Sublessee ("Closing"), there shall be no breach or default by Sublessee of any term, provision or condition of this Sublease, nor shall any circumstances exist which, with the passage of time, or giving of notice, or both, would constitute such a breach or default."

The Sublease does not have a provision concerning default by the Sublessee or termination of the Sublease. Absent such provisions modifying the default or termination provisions of the Overlease, the Bankruptcy Court determined that the Overlease governed the Fayolle Trustee's right to terminate the Sublease and applied Paragraph 17(2) of the Overlease. Paragraph 17(2) states:

> If Tenant shall make default in the payment of the rent reserved herein or any item of additional rent herein mentioned or any part of either or in making any other payment herein required: then and in any of such events Owner may without notice, re-enter the demised premises either [by] force or otherwise, and dispossess Tenant by summary proceedings or otherwise, and the legal representative of Tenant or other occupant of demised premises and remove their effects and hold the premises as if this lease had not been made, and Tenant hereby waives the service of notice of intention to re-enter or to institute legal proceedings to that end.

Pursuant to this language, the Bankruptcy Court held that because Authentic defaulted in the payment of rent under the Sublease, the Fayolle Trustee had a right to terminate the Sublease which he did under the Termination Letter.

DISCUSSION

A. STANDARD OF REVIEW

A district court functions as an appellate court in reviewing judgments rendered by bankruptcy courts. See *28 U.S.C. § 158(a); Abrass v. White, 2003 U.S. Dist. LEXIS 23625, No. 03CV64ORL31, 2003 WL 23009855, at *2 (M.D. Fla. Mar. 24, 2003).* Appeals to a district court from an order of a bankruptcy court "shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts... ." *28 U.S.C. § 158(c)(2).* A district court may not set aside findings of fact unless clearly erroneous. *Fed. R. Bankr. P. 8013; In re Manville Forest Products Corp., 896 F.2d 1384, 1388 (2d Cir. 1990).* A finding of fact is clearly erroneous if the court is "left with the definite and firm conviction that a mistake has been committed." *In re Manville, 896 F.2d at 1388* (quoting *United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948)*); accord *Abrass, 2003 U.S. Dist. LEXIS 23625, 2003 WL 23009855 at *2.*

However, a bankruptcy court's conclusions of law are reviewed de novo. *In re Manville, 896 F.2d at 1388.* It is settled law that a grant of summary judgment is reviewed de novo to determine if there are genuine issues of material fact. See *Greene v. United States, 13 F.3d 577, 580 (2d Cir. 1994); Bryant v. Maffucci, 923*

F.2d 979, 982 (2d Cir. 1991). There can be no genuine issues of material fact if both parties requested summary judgment. See, e.g., *Greene, 13 F.3d at 580.* Moreover, in this case, Appellant does not contend that there is a genuine issue of material fact requiring trial. See *In re Fayolle, 300 B.R. 843, 845 (Bankr. S.D.N.Y. 2003)*(stating that, in the instant matter, "there [were] no material issues of disputed fact, as this [was] fundamentally a documentary dispute"). Rather Appellant argues that the Bankruptcy Court incorrectly applied the controlling law to the facts of this case. Namely, that the Bankruptcy Court erroneously determined that the Fayolle Trustee was entitled to terminate the sublease.

Appellant argues that the Bankruptcy Court incorrectly held that Paragraph 17 of the Overlease was "incorporated by reference" into the Sublease. Appellant's second point is that, even so, "the termination was invalid as a matter of law and summary proceedings were necessary to extinguish Authentic's rights both to possession under the Sublease and to control the option." Appellant's Br. at 9. Appellant contends that the Bankruptcy Court erroneously found that summary proceedings were unnecessary in this case. Point III further argues that if it was determined that Authentic was not in possession, under the law, a summary proceeding was still necessary to extinguish Authentic's leasehold where Authentic was still claiming a right of possession. Lastly, Appellant argues that the alleged notice of default served by the Fayolle Trustee's attorney was ineffective as a matter of law and was not properly served upon Authentic as required under the Sublease.

Appellees counter that the Court should dismiss arguments all but Appellant's last argument because those issues were not raised below and preserved for appeal, and thus were waived. Further, in response to Appellant's last argument, Appellees contend that the Sublease should not be reinstated because under Paragraph 17(2) of the Overlease defaults for non-payment of rent are incurable.

B. ARGUMENTS NOT PRESERVED FOR APPEAL

It is established law that "an appellate court will not consider an issue raised for the first time on appeal." *Bayway Refining Co. v. Oxygenated Mktg. and Trading A.G., 215 F.3d 219, 222 n.2 (2d Cir. 2000)*; *Greene, 13 F.3d at 586*. This is the rule even where "the new appellate claim is purely a legal question following a summary dismissal proceeding." *Schmidt v. The Polish People's Republic, 742 F.2d 67, 70 (2d Cir. 1984)*. However, the appellate court may disregard the general rule when necessary to remedy an obvious or manifest injustice. See *Greene, 13 F.3d at 586*; *Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 527 (2d Cir. 1990)*; see also *Sojak v. Hudson Waterways Corp., 590 F.2d 53, 54-55 (2d Cir. 1978)* (finding a jury verdict entered without legal support to be manifest injustice).

The Bankruptcy Court's ruled that "because Authentic defaulted in the payment of rent under the Sublease (not paying any monthly rent, among other amounts), the Fayolle Trustee therefore had the right, under Paragraph 17(2) of the Overlease as incorporated in the Sublease, to terminate the Sublease, which he did under the Termination Letter[,]" see *In re Fayolle, 300 B.R. 843, 853-54 (Bankr. S.D.N.Y. 2003)*. From this language, Appellant contends that the Bankruptcy

Court "actually considered" the issues of non-incorporation by reference. See Appellant Reply Br. at 17 (citing 4 C.J.S. Appeal & Error, § 213). According to Appellant, because the Bankruptcy Court incorporated Paragraph 17(2) of the Overlease to find that Authentic's non-payment of rent allowed the Fayolle Trustee to terminate the Sublease, the Bankruptcy Court, therefore, must have considered that Paragraph 17(2) was not incorporated. This argument is circular and unsupported by the case law.

In *Air Et Chaleur, S.A. v. Janeway, 757 F.2d 489, 493 (2d Cir. 1985)*, the Second Circuit determined that an issue was not considered by the district court because the defendant-appellant was represented by "competent counsel who took a calculated risk in not presenting an alternative interpretation of his client's case" to the lower court. Thus, the Second Circuit held that such a "strategically motivated attack" was not manifest injustice. Id.; see also *Schmidt v. Polish People's Republic, 742 F.2d 67, 70 (2d Cir. 1984)* (holding that because plaintiff consistently argued in the district court that New York law applied, plaintiff was barred at the appellate level from arguing that another state's law, and not New York's, applied).

Similarly here, Appellant did not present the alternative argument to the Bankruptcy Court that Paragraph 17 of the Overlease was not incorporated by reference into the Sublease. What Authentic did argue was that Paragraph 17 of the Overlease was incorporated into the Sublease to support its position that the Sublease was improperly terminated. Authentic instead argued that under Paragraph 17(1) of the Overlease, the Sublease was not properly terminated because Authentic it was entitled to notice

and an opportunity to cure its non-payment default. See, e.g., R. 11 at PP33-34 & n. 10; see also *In re Fayolle, 300 B.R. 854* ("Authentic relies, however, on the wrong provision of the Overlease: paragraph 17(1), which expressly does not apply to defaults in the payment of rent").

Appellant further argues that, although it was not briefed, the issue of the Overlease's incorporation was extensively debated during oral argument before the Bankruptcy Court, and thus the issue was preserved on appeal. Appellant contends the issue is not one of preservation of issues on appeal but whether the issue was properly presented to the appellate panel. However, such a distinction is unsubstantiated. Issues not argued in briefs are considered waived and not addressed on appeal. See *Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998)*. Moreover, the Second Circuit has held "merely incorporating by reference" an argument presented below, addressing an argument initially raised in a footnote, "stating an issue without advancing an argument, or raising an issue for the first time in a reply brief" was inadequate to preserve an issue for appellate review. Id.; see also *Frank v. United States, 78 F.3d 815, 833 (2d Cir. 1996)* vacated on other grounds, *521 U.S. 1114, 117 S. Ct. 2501, 138 L. Ed. 2d 1007 (1997)* (collecting cases).

Appellant's sole support for the proposition that "an issue actually considered by the trial court ... may be considered on appeal", see 4 C.J.S. Appeal & Error § 213, states that "to be considered on review, a matter must have been timely presented to the trial court in a manner sufficient to obtain a ruling thereon ...." Id. During oral argument, and to support its argument that it did not receive proper notice of the Sublease's

termination, Appellant argued to the Bankruptcy Court that the Sublease did not suggest that the trustee stepped into the overlandlord Anchor's position. R.29 at 37-40. This prompted the Bankruptcy Court to ask Appellant whether the Overlease was incorporated into the Sublease. Id. at 40. The transcript does not indicate that the purpose of this discussion was to obtain a ruling from the Bankruptcy Court on the issue of the Overlease's incorporation by reference. Nor does the transcript indicate that Appellant argued to the Bankruptcy Court that Paragraph 17 of the Overlease was not incorporated into the Sublease to obtain such a finding from the Bankruptcy Court. Moreover, in its Post-Hearing Memorandum of Law in Support of Motion For Summary Judgment ("Post-Hearing Memo") to the Bankruptcy Court, the issue of non-incorporation was not raised or mentioned. See *Warren v. Garvin, 219 F.3d 111, 113 n.2 (2d Cir. 2000)* (holding that although appellant addressed the issue at oral argument in response to questions from the appellate panel, the issue was not raised in appellant's brief and therefore not reviewable on appeal).

Appellant contends that "so long as the facts necessary have been fully developed, obviating any further need to establish a record," and "where only an application of the law to the facts is required, and the argument raised is slightly more precise or slightly different, this Court may review same without restriction." Appellant's Reply Br. at 20, n.14 (collecting cases). However, the cases cited by Appellant for this proposition does not cure its waiver. See, e.g., *Restrepo v. McElroy, 369 F.3d 627, 633 n.10* (noting that the petitioner-appellee's decision to raise an argument on appeal which was not raised in his habeas petition was

understandable because none of the Second Circuit's cases dealing with the issue was decided when he applied for habeas relief); *Ford v. Bernard Fineson Dev. Ctr., 81 F.3d 304, 307 (2d Cir. 1996)* (accepting appellant's new legal argument on appeal because it concerned an issue "already considered at some length" by the lower court). Even accepting Appellant's contention that it's non-incorporation argument is a new legal issue raised on appeal, this Court exercises its discretion, and does not consider this legal argument. See *Ford, 81 F.3d at 307* (noting that the Second Circuit "reserve[s] considerable discretion to review purely legal questions not formally raised [below]" if it is not necessary to make any additional factual determinations). Appellant has demonstrated no manifest injustice.

In Higgins v. New York Stock Exch., the Second Circuit found appellant's time-of accrual argument "different in emphasis from the point pressed on appeal", it was not waived for appellate review. *942 F.2d 829, 832 (2d Cir. 1991)* (finding that appellant "argued before the district court that his claim against the Exchange did not accrue until after he knew the exact amount of *damages* caused by the Exchange's decision."). However, the Court did reject appellant's assertion, that its equitable tolling argument should be accepted on appeal because the argument was the "mirror image" of appellant's argument below. *Id. at 831.* In this case, Appellant's argument is not "slightly more precise" or "slightly different" as it contends, but wholly different and new. The alternative argument that the Overlease was not incorporated by reference into the Sublease was not presented to the Bankruptcy Court and cannot be reviewed on appeal.

Also not preserved for appeal is Appellant's alternative argument that if Paragraph 17 was properly incorporated by reference into the Sublease, the termination was ineffective. Appellant's contends that if Paragraph 17 is determined to be incorporated into Sublease, and therefore there was a valid termination, the Bankruptcy Court erroneously determined that summary proceedings was not needed to terminate Authentic's tenancy. On the record before this Court, these arguments were not advanced below and are not subject to review.

C. THE TERMINATION LETTER WAS EFFECTIVE NOTICE AND NOT DEFECTIVE

Appellant's final argument for reversal of the Bankruptcy Court's decision is that assuming the Fayolle Trustee was entitled to terminate the lease for non-payment of rent under Paragraph 17(2), the Bankruptcy Court erred in upholding the termination because the Termination Letter was defective.

Appellant's primary argument is that service of the Termination Letter or notice to Appellant by the Fayolle Trustee was not in accordance with the terms of the Sublease. Paragraph 13 of the Sublease requires that "notices ... hereby shall be sent by registered or certified mail, postage prepaid, return receipt requested to ... Sublessee at 105 West 55th Street, Suite 8D, New York, New York 10019, attention John Fayolle." Appellant contends that although the Termination Letter was sent by certified mail, it improperly omitted the suite number of Fayolle who lives in an eighty-unit residence with no doorman. He thus argues that he did not receive timely notice. Further, appellant argues that delivery of the

Termination Letter to Authentic's attorneys by fax on August 9, 2002, was not a valid replacement because it was too late for them to seek a Yellowstone injunction to toll the termination and preserve Authentic's right to cure the default. See *First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., 21 N.Y.2D 630, 237 N.E.2d 868, 290 N.Y.S.2d 721 (1968)* (affording injunctive relief in landlord-tenant disputes to avoid a forfeiture of the leasehold).

However, a*Yellowstone* "injunction is not available where a default cannot be cured." *Boyarsky v. Froccaro, 125 Misc. 2d 352, 479 N.Y.S.2d 606, 610-11 (N.Y. Sup. Ct. 1984)*; cf. *King Party Ctr. of Pitkin Ave. v. Minco Realty, LLC, 286 A.D.2d 373, 729 N.Y.S.2d 183 (2d Dep't 2001)* (holding that a Yellowstone injunction is inappropriate after the expiration of the cure period). In this action, Paragraph 17(2) of the Overlease states that the "Tenant hereby waives the service of notice of [Owner's] intention to re-enter or institute legal proceedings to that effect." Therefore, the Bankruptcy Court properly determined that "Authentic waived notice of termination for failure to pay rent." Paragraph 17(2) does not say anything about curing defaults for payment of rent. Thus, Appellant could not cure its default for non-payment of rent. See *In re Fayolle, 300 B.R. at 855*; see also Appellant's Reply Br. at 15 (stating that Authentic agrees with Appellees' that a Yellowstone injunction is not appropriate). n5

Although Appellant does not suggest that "the sending of a termination notice was authorized by contract" it also argues that to the extent that Appellees did serve notice, Appellees were bound by what was served, and that if a termination notice was inadequate as to its contents, it is ineffective to

terminate a tenancy. See Appellant's Reply Br. at 14. The thrust of Appellant's argument is that the July 25, 2002, Termination Letter did not contain "a specific recitation of the facts upon which the notice is based, which in this case would be the amount due." Appellant's. Br. at 41. Pursuant to § 17(2) of the Overlease, no notice is required to be given to a tenant who has defaulted on its obligation to pay rent. Since Authentic admits it never paid any rent whatsoever, it was not entitled to receive notice. Even if notice was required, the notice given to Authentic was legally sufficient as it was clear, unambiguous and unequivocal. *Ellivkroy Realty Corp. v. HDP 86 Sponsor Corp., 162 A.D.2d 238, 556 N.Y.S.2d 339, 340 (N.Y. App. Div. 1990); City of Buffalo Urban Renewal Agency v. Lane Bryant Queens, Inc., 90 A.D.2d 976, 456 N.Y.S.2d 568, 569 (N.Y. App. Div. 1982), aff'd, 59 N.Y.2d 825, 451 N.E.2d 501, 464 N.Y.S.2d 754 (N.Y. 1983)* (citations omitted). The notice indicated that the termination was for failure to timely pay rent, cited the specific provision of the lease claimed to be violated, and provided the date the lease would be terminated. Thus, even though Authentic had waived the right to receive any notice, the notice properly set forth the requisite information. See, *SAAB Enters. v. Bell, 198 A.D.2d 342, 603 N.Y.S.2d 879, 880 (N.Y. App. Div. 1993).*

In light of the foregoing, the judgment appealed from is therefore affirmed.

Dated: New York, New York

December 22, 2004

SO ORDERED:

GEORGE B. DANIELS

United States District Judge

Footnotes

n1 The Bankruptcy Court determined that these conditions were not satisfied. See *In re Fayolle, 300 B.R. 843, 851-52 (Bankr. S.D.N.Y. 2003)*. This finding is not an issue in this appeal.

n2 Mr. Fayolle did allege that his own personal property was kept at the premises. (Fayolle Aff'd. in further Supp. of Authentic's Mot. for partial Summ. J. at P26).

n3 Paragraph 5 states in relevant part, "(a) Sublesee shall pay to Sublessor, as minimum fixed rent during the term of this Sublease, in monthly installments on the first day of each and every calendar month, with no abatement, deduction, counterclaim or setoff whatsoever...".

n4 Paragraph 2 reads, "Sublessor hereby sublets to Sublessee, and Sublessee hereby hires from Sublessor, the Demised Premises consisting of the entire Building, as described in the Overlease, a true copy of which is attached as Exhibit A, and made a part hereof."

n5 Further, there is no need to address Appellant's contention that it was not advised by the Termination Letter on how to cure its default because Paragraph 17(2) does not provide Appellant with the right to cure.

Chapter 11, Case Nos. 00 B 41291, 00 B 41292, 00 B 41293 (RDD) (Jointly Administered), Adv. Pro. No. 02-03115

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: JOHN B. FAYOLLE and RIVERBANK LANDSCAPE, LTD. and ARISTOCRATIC COACH CORP., Debtors. AUTHENTIC HANSOM CABS, LTD.,
Plaintiff,

against

ALAN NISSELSON, TRUSTEE FOR THE CHAPTER 11 ESTATE OF JOHN FAYOLLE AND RIVERBANK LANDSCAPE, LTD., FRANK SINATRA, TRUSTEE FOR THE CHAPTER 11 ESTATE OF ARISTOCRATIC COACH CORP., ANCHOR PAPER STOCK CO., INC., and 504 WEST 38 LLC,
Defendants.

September 2, 2003, Decided

COUNSEL: For Authentic Hansom Cabs, Ltd.: Ira R. Abel, COHEN TAUBER SPIEVACK & WAGNER LLP.

For 504 West 38 LLC: Jack Hazan, KRAMER LEVIN NAFTALIS & FRANKEL LLP.

For Alan Nisselson, chapter 11 trustee of John Fayolle and Riverbank Landscape, Ltd.: Leslie S. Barr, BRAUNER BARON ROSENZWEIG & KLEIN LLP.

For Frank Sinatra, chapter 11 trustee of Aristocratic Coach Corp.: Peter Alan Zissler, HOLLAND & KNIGHT LLP.

For Anchor Paper Stock Co.: Robert J. Bergson, MARCOLIS BERGSON LLP.

JUDGES: Robert D. Drain, United States Bankruptcy Judge.

OPINIONBY: Robert D. Drain

OPINION:

MEMORANDUM DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

ROBERT D. DRAIN, United States Bankruptcy Judge

Each party in this adversary proceeding seeks a declaratory judgment with respect to the status of a sublease (the "Sublease") dated December 19, 2001 between Alan Nisselson (the "Fayolle Trustee"), in his capacity as chapter 11 trustee of John Fayolle ("Fayolle"), as sublessor, and Authentic Hansom Cabs, Ltd. ("Authentic"), as sublessee. The Sublease pertains to a building located at 504-506 West 38th Street in New York City (the "Building"). Defendant Anchor Paper Stock Co. ("Anchor") is the landlord under the main lease of the Building pursuant to a Standard Form of Loft Lease and Rider, each dated as of November 1, 1997 (the "Overlease"), with Fayolle as tenant. Pursuant

to an order of the Court (Hon. Richard Bohanon, J.) dated November 22, 2002, the Fayolle Trustee assumed and assigned the Overlease to 504 West 38 LLC. Under the November 22, 2002 order, the assignment to 504 West 38 LLC was free and clear of all encumbrances but expressly was subject to the rights, if any, of Authentic as determined in this adversary proceeding.

Authentic takes the position that the Sublease remains in effect. The Fayolle Trustee and the other defendants contend, instead, that the Fayolle Trustee validly terminated the Sublease for, among other things, Authentic's non-payment of rent.

Relatedly, but separately, Authentic seeks a declaration that it has the right to offset or recoup its obligations under the Sublease against obligations owing to Authentic, specifically $ 100,000 that Authentic contends it is owed under a settlement agreement dated as of December 19, 2001 (the "Hudson Settlement Agreement"), between, among others, Authentic, on the one hand, and the Fayolle Trustee and Frank Sinatra (the "Aristocratic Trustee;" with the Fayolle Trustee, the "Trustees"), as chapter 11 trustee of Aristocratic Coach Corp. ("Aristocratic"), on the other. Authentic argues that such setoff or recoupment would satisfy its obligations under the Sublease or, at least, render the Fayolle Trustee's termination of the Sublease defective and invalid. (Alternatively, Authentic seeks an injunction directing that the $ 100,000 be paid to it if it does not have a valid right of setoff or recoupment against its Sublease obligations.) Authentic also argues that Anchor's refusal to consent to Authentic's proposed alterations of the Building excuses Anchor's default under the Sublease.

The Trustees and the other defendants deny that Authentic has any right of setoff or recoupment against its obligations under the Sublease, and, in any event, that the conditions under which Authentic would have been entitled to the $ 100,000 under the Hudson Settlement Agreement have failed. The defendants also contend that Anchor had the right to refuse to consent to the proposed alterations to the Building and, in any event, that Anchor's wrongful withholding of consent would not excuse Authentic's failure to perform its obligations under the Sublease.

Each side seeks summary judgment -- the defendants, who have not made a formal motion for summary judgment, on the basis that "In considering a motion for summary judgment, if the Court's analysis reveals that there are no genuine issues of material fact, but that the law is on the side of the nonmovant, the Court may grant summary judgment in favor of the nonmovant even in the absence of a cross-motion . . . so long as the movant has had an adequate opportunity to come forward with all of its evidence." *Jacques v. DiMarzio, Inc.*, 200 F. Supp.2d 151, 162 (E.D.N.Y. 2002); *see also Orix Credit Alliance, Inc. v. Horten*, 965 F. Supp. 481, 484 (S.D.N.Y. 1997); 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2720 (2d ed. 1983).

There are no material issues of disputed fact, as this is fundamentally a documentary dispute. Because Authentic's position is not supported by the relevant documents or applicable law, Authentic's motion for summary judgment is denied. Defendants' arguments being the reverse image of Authentic's arguments, defendants' request for summary judgment is appropriate and is granted. The Trustees do not owe

Authentic any money under the Settlement Agreement, the conditions for such payment having failed. Thus, whether Authentic has a right of setoff or recoupment in respect of the Sublease is moot. Anchor's refusal to consent to the proposed modifications to the Building, whether or not valid, does not excuse Authentic's defaults under the Sublease. Nor has Authentic offered any other valid reason for contesting the Fayolle Trustee's termination of the Sublease.

Facts

The facts are found, unless otherwise noted, in Authentic's statement pursuant to Local Bankruptcy Rule 7056-1(a) and the documents referred to therein, which are attached as exhibits to Fayolle's affidavits dated March 4, 2003 ("Fayolle Affidavit 1"), and June 23, 2003. Defendants' responsive statement pursuant to Local Bankruptcy Rule 7056-1(b) does not dispute the facts set forth in Authentic's Rule 7056-1(b) statement but, rather, disagrees with Authentic's characterization of certain of those facts.

On May 15, 2000, involuntary chapter 7 petitions were filed against Fayolle and two entities controlled by him -- Riverbank Landscape, Inc. ("Riverbank") and Aristocratic. The debtors voluntarily converted their cases to chapter 11, but Judge Bohanon subsequently appointed the Trustees. n1 The Trustees decided to market the debtors' assets jointly. Those assets primarily consisted of the Overlease and real property owned by Aristocratic at 634 West 52nd Street, New York City (the "Aristocratic Premises"), which was used as a livery stable for hansom cab horses, and real property owned by Riverbank at 639-41 West 51st Street (the "Riverbank Premises"), which was a defunct

"adult entertainment facility." The Riverbank Premises and the Aristocratic Premises are adjacent to each other on the Hudson River waterfront and are referred to together as the "Blockfront Properties."

In December, 2001 the Trustees entered into an agreement to sell the Blockfront Properties and the Overlease with stalking horse bidders, subject to higher and better offers to be received at an auction scheduled for January 25, 2002.

Two non-debtor entities controlled by Fayolle -- Authentic and Hudson River Lounge, LLC ("Hudson") -- asserted leasehold interests in the Aristocratic Premises and the Riverbank Premises. To facilitate the marketing of the Blockfront Properties, which were more attractive to prospective purchasers if Authentic and Hudson did not have the right to hold over as tenants under section 365(h) of the Bankruptcy Code, the Trustees negotiated the Hudson Settlement Agreement with Fayolle, Hudson and Authentic at the same time that they were negotiating with the stalking horse bidders.

Under the Hudson Settlement Agreement, Authentic agreed to terminate its lease of the Aristocratic Premises and Hudson agreed to terminate its lease of the Riverbank Premises, each waiving their right to hold over under section 365(h). In return, the Fayolle Trustee agreed to sublease the Building to Authentic, and the Trustees agreed to make two payments to Authentic, one of $ 75,000 and one of $ 25,000, under certain specified conditions. In the Hudson Settlement Agreement, Authentic also agreed to satisfy an overdue $ 20,000 rent obligation under its lease of the Aristocratic Premises by applying such

amount in three installments to amounts owing under the Overlease. It was understood that Authentic intended to try to develop and operate the Building as a livery stable to replace the Aristocratic Premises that it was agreeing to vacate under the Hudson Settlement Agreement. n2

Pacific Circle, Inc. ("Pacific Circle") was the winning bidder at the January 25, 2002 auction. By order dated February 5, 2002 (the "February 5 Order"), Judge Bohanon approved the Trustees' proposed sale to Pacific Circle, including the assignment of the Overlease, as well as approved the Settlement Agreement and the Fayolle Trustee's entry into the Sublease. The term of the Sublease commenced sixty days after receipt of Court approval, or April 6, 2002, which one can infer from the Hudson Settlement Agreement was roughly the time believed to be required for Authentic to move the livery operation out of the Aristocratic Premises and into the Building in anticipation of the closing of the Pacific Circle transaction. The effectiveness of the Sublease was not conditioned, however, upon the closing of the Pacific Circle transaction. Nor was the effectiveness of the Hudson Settlement Agreement, although, as discussed in more detail below, Authentic's right to the $ 100,000 *was* tied to the closing of the proposed sale transaction.

Paragraph K(v) of the February 5 Order recited the amount outstanding under the Overlease as of January 31, 2002 -- $ 124,553.57 -- and required this sum, together with any additional amounts accrued through the date of the closing, to be paid as cure under section 365(b) of the Bankruptcy Code upon the assumption and assignment of the Overlease to Pacific Circle. The February 5 Order also confirmed Anchor's consent to

the Sublease, provided that it was paid an additional $ 57,000 security deposit.

Notwithstanding the foregoing, however, Authentic never occupied the Building under the Sublease, although Authentic contends that for some period it had access to the premises. Authentic also has not received any of the $ 100,000 of conditional payments set forth in the Settlement Agreement. Nor has Authentic paid any portion of the rent provided under the Sublease or the $ 20,000 under the Hudson Settlement Agreement. It also has not paid the $ 57,000 security deposit referred to in the February 5 Order. Fayolle Affidavit 1 P 56.

The context of the foregoing becomes somewhat clearer when it is understood that Pacific Circle did not close the sale approved in the February 5 Order, although Pacific Circle's failure to close does not explain why Authentic failed to make its rental payments under the Sublease and the Hudson Settlement Agreement.

It was not immediately apparent that Pacific Circle was not going to close. Instead, there was a lengthy limbo period during which the parties postponed the closing in the hope that Pacific Circle could complete its financing and simultaneously considered fallback alternatives. At one point, Pacific Circle increased its security deposit from $ 400,000 to $ 500,000 to obtain a little more time. During this period, Pacific Circle also corresponded with Anchor about Authentic's proposed alterations to the Building. In anticipation of a closing "within the next few weeks," on May 14, 2002 Pacific Circle's counsel requested Anchor's approval of Authentic's preliminary alteration plans. Anchor's

counsel responded to this request in a letter dated May 30, 2002 in which he described Anchor's reasons for withholding its consent to the proposed alterations, Anchor's primary concerns being that the plans contemplated material structural changes to the Building (which Anchor asserts required Anchor's consent under Article 3 of the Overlease) and that Authentic would have to provide additional information before Anchor could evaluate fire, odor, environmental and construction-related issues. n3 At about the same time, Anchor's counsel informed counsel for the Fayolle Trustee of a revised cure amount under section 365 of the Bankruptcy Code assuming a June 4, 2002 closing -- $ 182,517.47 -- the $ 57,963.90 increase from the cure amount stated in the February 5 Order primarily comprising unpaid rent from February through June, 2002.

During the period that the closing of the Pacific Circle transaction was postponed, rent obviously continued to accrue under the Overlease, which presented a problem for the Trustees since Authentic was not making the rent payments required by the Sublease and the Hudson Settlement Agreement. On March 20, 2002, counsel for the Aristocratic Trustee notified counsel for Fayolle and Authentic that Authentic had defaulted on its obligation under the Hudson Settlement Agreement to pay $ 20,000 of back rent on the Overlease. By letter dated April 22, 2002, the Fayolle Trustee informed Fayolle that, "given the lack of progress to close the [Pacific Circle] transactions," he was not prepared to permit Fayolle (who had no contractual privity with the Fayolle Trustee, Authentic being the subtenant) to continue to

utilize the Building rent-free and was changing the locks.

Then, by letter dated July 25, 2002 (the "Termination Letter"), counsel for the Fayolle Trustee notified Authentic that "by reason of Sublessee's defaults under the captioned Sublease, including without limitation under Paragraph 5 of the Sublease, [the Fayolle Trustee] has elected to terminate the Sublease, effective as of 11:59 p.m., July 31, 2002." Separate and apart from the Fayolle Trustee's cure obligations in respect of the Overlease, unpaid rent under the Sublease for the period from April 6, 2002 through July 31, 2002 was at least $ 48,387.68. Fayolle Affidavit 1 P 71.

The parties dispute when Authentic received the Termination Letter, but they agree that Authentic's counsel received it no later than August 9, 2002. In a letter dated August 14, 2002, Authentic's counsel responded to the Termination Letter by refusing to accept the termination of the Sublease, for basically the same reasons that Authentic has raised in this adversary proceeding, and noted that the parties had "agreed to disagree for the moment without prejudice to either side." In response to the Termination Letter, Authentic [**14] did not propose to make any payment in respect of rent under the Sublease, or the $ 20,000 under the Hudson Settlement Agreement, or the security deposit, all of which remained unpaid.

Roughly at the same time, on August 5, 2002 Anchor filed a motion for relief from the automatic stay under section 362 of the Bankruptcy Code to terminate the Overlease for nonpayment of rent.

At a hearing on August 28, 2002, Judge Bohanon issued a bench ruling denying Anchor's motion to terminate the Overlease, on the condition, however, that the Fayolle Trustee promptly cure the outstanding payment defaults under the Overlease. n4 At the hearing, the Fayolle Trustee proposed to pay the cure amount with a portion of the $ 500,000 security deposit that Pacific Circle had forfeited upon its failure to close, the parties by that time having accepted that the Pacific Circle transaction was not going to happen. Judge Bohanon found this acceptable.

Authentic's counsel actively opposed Anchor's lift-stay motion at the August 28, 2002 hearing, fully supporting the Fayolle Trustee's payment of the arrearages under the Overlease. Oddly, no party informed Judge Bohanon that the Fayolle Trustee had delivered the Termination Letter weeks before the August 28, 2002 hearing. No party has suggested, however, that the Fayolle Trustee ever rescinded or expressly waived the Termination Letter -- as opposed to Authentic's assertion that the Fayolle Trustee implicitly waived termination by not immediately enforcing his rights after receipt of Authentic's response to the Termination Letter and instead "permitted" Authentic to pursue this litigation -- and no such waiver appears in the record.

On August 29, 2002, the roof of the Building partially collapsed, and there is no dispute that since August 29, 2002 Authentic has not been in physical possession of the Building.

One of the Fayolle Trustee's arguments for denying Anchor's lift-stay motion was that the Trustees were about to seek Court approval of a new auction sale

process for the Blockfront Properties and the Overlease, now that the back-up bidder who had been approved by the February 5 Order also had failed to close. Having obtained Court approval to do so, on September 18, 2002 the Trustees held another auction of the Blockfront Properties, although the Fayolle Trustee had decided by then to remove the Overlease from the assets to be auctioned that day. By order dated September 20, 2002 the Court approved the highest bidder at this second auction of the Blockfront Properties, and that high bidder has since closed the transaction. The sale price resulting from the September 18, 2002 auction was substantially less than the price under the original, January 25, 2002 auction, however.

Authentic commenced this adversary proceeding on September 18, 2002. The Fayolle Trustee continued to market the Overlease, and by order dated November 22, 2002, Judge Bohanon approved the sale of the Fayolle Trustee's interest in the Overlease to 504 West 38 LLC, subject, as noted above, to Authentic's rights, if any, asserted in this proceeding. The actual cure amount under section 365(b)(1)(A) of the Bankruptcy Code upon the Fayolle Trustee's assumption and assignment of the Overlease to 504 West 38 LLC was $ 265,000, which the Fayolle Trustee has paid. Affidavit of Alan Nisselson, dated May 7, 2003, P 15. (Apparently Anchor waited until after the closing of the assignment to 504 West 38 LLC to take its cure payment, notwithstanding Judge Bohanon's August 28, 2002 bench ruling.)

Jurisdiction

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (M) and (O) and a controversy appropriate for declaratory judgment relief under 28 U.S.C. § 2201 and Bankruptcy Rule 7001(9).

Standard on Motion for Summary Judgment

Under Fed. R. Civ. P. 56(c), which is made applicable to this proceeding by Bankruptcy Rule 7056, summary judgment must be entered when "there is no genuine issue of any material fact and . . . the moving party is entitled to judgment as a matter of law." Summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In determining whether a genuine issue of material fact exists, "the Court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). However, the party opposing summary judgment must do more than show "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

Summary judgment is particularly appropriate if, as here, the issue depends on the unambiguous terms of written agreements. *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir. 1989); *DBL Liquidating Trust v. Clarkson Constr. Co. (In re Drexel Burnham Lambert Group, Inc.)*, 157 B.R. 539,

543 (S.D.N.Y. 1993). When a contract governs an issue, "summary judgment may be granted when its words convey a definite and precise meaning absent any ambiguity." *Seiden Assoc., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992). Contract terms are unambiguous "when they have a definite and precise meaning, unattended [**19] by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion." *LTV Corp. v. AM Gen. Corp. (In re Chateaugay Corp.)*, 154 B.R. 843, 847 (Bankr. S.D.N.Y. 1993) (internal quotations and citations omitted). "Unambiguous contract language is not made ambiguous simply because the parties urge different interpretations. Nor does ambiguity exist where one party's view strains the contract language beyond its reasonable and ordinary meaning." *Id.* (internal quotations and citations omitted.). Although at times Authentic has addressed the parties' intent, especially in connection with the Hudson Settlement Agreement, Authentic and the other parties have properly kept their focus on the parties' intent as expressed in the actual language of the Sublease, the Overlease and the Hudson Settlement Agreement, because the Court may not consider extrinsic evidence of the parties' intent if the relevant contract language is unambiguous. *Seiden*, 959 F.2d at 428.

Discussion

A. Authentic's Rights under the Hudson Settlement Agreement. Paragraph 4 of the Hudson Settlement Agreement [**20] describes the circumstances under which Authentic shall be paid, and in some cases keep, up to $ 100,000:

The Trustees will pay or cause to be paid to Authentic the sum of $ 100,000 as follows:

(a) $ 75,000 upon the Effective Date, payable solely from the down payments to be delivered to and held by the escrow agents under the terms and conditions of the Agreements or the Sale Agreements, for Authentic's use first to cure all arrears and defaults on the [Overlease] in order to permit the Trustee to assume [the Overlease], and next to build livery stables at the [Building] within 60 days, and

(b) $ 25,000 to be paid at the closing of the Agreements or the Sale Agreements, *provided* that in the event that Authentic fails to vacate the Aristocratic Property within the 60-day time frame required in sub-paragraph (a) above, Authentic shall not be entitled to any portion of the $ 25,000 payment. Notwithstanding its failure to meet the 60-day time frame and the forfeiture of the $ 25,000 payment, Authentic's obligations to vacate the Aristocratic Property, waive its rights arising under or in connection with the Aristocratic Property, the Authentic Lease or Bankruptcy Code § 365(h), and to withdraw the Authentic Claim will remain as continuing obligations, in full force and effect, enforceable in accordance with the terms of this Agreement.

(Emphasis added.)

The Hudson Settlement Agreement defines the "Agreements" referred to in paragraph 4, above, as the sale agreements with the Trustees' stalking horse buyers, Specialty Malls of Tampa, Inc. and Pier West LLC, which they entered into in anticipation of and subject to the auction conducted on January 25, 2002. Hudson Settlement Agreement P K. The Hudson Settlement Agreement defines the "Sale Agreements" referred to in paragraph 4 as the "Agreements, or such other agreements that may be approved as higher or better" by the Court. *Id.* P1. The definition is found in the Hudson Settlement Agreement's definition of the "Effective Date" of the settlement:

> This Agreement is subject in all respects to, and will be effective upon the last to occur of (a) the Court's entry of (i) an order approving this Agreement ('Approval Order') and (ii) an order ('Sale Order') approving the Agreements, or such other agreements that may be approved as higher or better ('Sale Agreements') ('Effective Date').

1. Authentic's Right to $ 25,000. It is clear from the foregoing definitions, therefore, that the condition for the Trustees' payment of $ 25,000 to Authentic under paragraph 4(b) of the Hudson Settlement Agreement never occurred. Neither the "Agreements" nor the "Sale Agreements" closed. Neither the stalking horse transaction with Specialty Malls and Pier West nor the Pacific Circle transaction nor the transaction with the second highest bidder at the January 25, 2002 auction that was approved in the February 5 Order closed. Instead, the Trustees eventually had to obtain Court

approval of a new auction that was held approximately nine months later, on September 18, 2002, and the winning bidder at that auction paid a substantially lower price than either Pacific Circle or the back-up bidder at the January 25, 2002 auction had agreed to pay, and, therefore, was not "higher or better" as required by paragraph 4(a). n5

2. Authentic's Right to $ 75,000. It also is clear from paragraph 4(a) of the Hudson Settlement Agreement that Authentic's right to retain any part of the $ 75,000 provided for therein (which under paragraph 4(a) it could use only for building livery stables, not to pay rent under the Sublease) arose *only* if that sum was not first required to cure defaults and arrears under the Overlease in order to permit the Fayolle Trustee to assume the Overlease under section 365 of the Bankruptcy Code. As stated in Paragraph K(v) of the February 5 Order, those cure amounts would not be exactly known until the date of the closing under the Pacific Circle transaction. However, also as made clear in Paragraph K(v) of the February 5 Order, even as of January 31, 2002 those cure amounts substantially exceeded $ 75,000. Indeed, at all relevant times the cure amounts under the Overlease substantially exceeded $ 75,000. Therefore, under the Hudson Settlement Agreement Authentic could not have spent any portion of the $ 75,000 on building livery stables until after the closing of the assignment of the Overlease, and could not have reasonably expected that any portion of the $ 75,000 would not have been consumed in satisfying cure obligations under the Overlease.

It is true that, contrary to paragraph 4(a) of the Hudson Settlement Agreement, Authentic never was provided with the $ 75,000 on the "Effective Date" of

the Hudson Settlement Agreement, February 5, 2002, to hold for application under paragraph 4(a). n6 However, in light of the size of the cure amounts under the Overlease, Authentic would have held such money only as a mere conduit. It would not have had the right to apply any portion of such funds, if it had been paid them, to build livery stables. Clearly Authentic would have breached the Hudson Settlement Agreement if it had applied such money to Authentic's rent obligations under the Sublease, which was not contemplated under paragraph 4(a) even if the Overlease cure amounts were, for some reason, less than $ 75,000. n7 Therefore, the Trustees' failure to provide Authentic with the $ 75,000 for application under paragraph 4(a) was an immaterial breach of the Hudson Settlement Agreement. Judge Bohanon's August 28, 2002 bench ruling directing the Fayolle Trustee to pay cure amounts (which exceeded $ 75,000) to Anchor from Pacific Circle's forfeited security deposit tacitly recognized that point. As noted above, Fayolle's counsel actively supported this result at the August 28, 2002 hearing.

The Fayolle Trustee now having paid the cure amounts in respect of the Overlease in a sum well in excess of $ 75,000, Authentic cannot claim any portion of such $ 75,000 under paragraph 4(a) of the Hudson Settlement Agreement.

B. Termination of the Sublease. Paragraph 5 of the Sublease states that "It is the intention of the parties that this Sublease shall be absolutely 'net' to the Sublessee. . . ." As stated in paragraph 5, "except for payments of rent from Sublessor to Overlessor and any other obligation of Sublessor expressly set forth herein, Sublessor shall have no obligations of payment or

performance under the Overlease, all of the same to be undertaken and paid or performed by Sublessee." Moreover, "in no event shall Sublessor be obligated to make any rent or other payment to Overlessor unless and until Sublessor has received the corresponding payment from Sublessee." *Id.*

Consistent with the foregoing, paragraph 2 of the Sublease specifically incorporates the Overlease and makes it a part of the Sublease. Paragraph 6 of the Sublease provides, further, that Authentic has assumed the terms, covenants and conditions imposed on the Fayolle Trustee under the Overlease, for purposes of Authentic's obligations to the Fayolle Trustee under the Sublease:

> For purposes of this Sublease, to the extent that the terms, covenants and conditions of the Overlease are not herein modified, cancelled or amended, such terms, covenants and conditions on the part of Sublessor thereunder to be performed, observed or complied with are hereby incorporated herein and made a part hereof with the same force and effect as though set forth at length herein. The said obligations created by the Overlease and incorporated herein by reference, imposed upon Sublessor, are hereby impressed upon Sublessee. n8

See also Sublease P 17:

> This Sublease is and shall be in all respects subject and subordinate to the terms,

> covenants, conditions and prohibitions set forth in the Overlease. . . . In the event of any conflict between the Sublease and the Overlease, the Overlease shall control.

The Sublease does not have a default or termination provision that modifies the default and termination provisions of the Overlease; under the foregoing provisions of the Sublease, therefore, the Fayolle Trustee's right to terminate the Sublease is governed by the Overlease. If the tenant defaults in the payment of rent, under paragraph 17(2) of the Overlease the landlord may, without any notice whatsoever, re-enter the premises, dispossess the tenant, and hold the premises as if the lease had not been made:

> If Tenant shall make default in the payment of the rent reserved herein or any item of additional rent herein mentioned or any part of either or in making any other payment herein required: then and in any such events Owner may without notice, re-enter the demised premises either by force or otherwise, and dispossess Tenant by summary proceedings or otherwise, and the legal representative of Tenant or other occupant of demised premises and remove their effects and hold the premises as if this lease had not been made, and Tenant hereby waives the service of notice of intention to re-enter or to institute legal proceedings to that end.

Because Authentic defaulted in the payment of rent under the Sublease (not paying any monthly rent, among other amounts), the Fayolle Trustee therefore

had the right, under paragraph 17(2) of the Overlease as incorporated in the Sublease, to terminate the Sublease, which he did under the Termination Letter.

Authentic makes several arguments that the Termination Letter nevertheless was ineffective, but each of them fails.

First, Authentic states that the Fayolle Trustee did not comply with the termination procedure required by the Overlease. Authentic relies, however, on the wrong provision of the Overlease: paragraph 17(1), which expressly does not apply to defaults in the payment of rent, rather than paragraph 17(2) of the Overlease, which does.

Second, Authentic contends that the Trustees' default under the Hudson Settlement Agreement and the February 5 Order approving that agreement excuses Authentic's nonpayment of rent. However (and leaving aside that paragraph 5.a. of the Sublease states that Authentic's obligation to pay rent is absolute, "with no abatement, deduction, counterclaim or setoff whatsoever") the Trustees have not materially defaulted under the Hudson Settlement Agreement or the February 5 Order, as discussed above. Authentic has no claim to any portion of the $ 100,000 that, under certain conditions specified in the Hudson Settlement Agreement, Authentic had the right to retain for its own use, those conditions not having occurred. Moreover, the Fayolle Trustee's termination of the Sublease was not premature; if the $ 75,000 had been applied to cure defaults under the Overlease at the time he sent the Termination Letter, Authentic still would have had a large unpaid rent obligation, because those cure payments substantially exceeded $ 75,000.

Third, the Fayolle Trustee has not waived the Termination Letter by agreeing to disagree with Authentic's position that the Sublease was improperly terminated or by participating in this adversary proceeding, as Authentic somewhat remarkably contends. To the contrary, the Fayolle Trustee has consistently defended the validity of his termination of the Sublease. Authentic, instead, took the risk that the termination of the Sublease would become effective pending the determination of the issues in this proceeding if it did not seek injunctive relief or resume performance of the Sublease. *Cf.* 2 Dolan, Rasch's Landlord & Tenant § 23:53 (4th ed. 2002), at 215-16:

> Without the [*Yellowstone*] injunction, the court is powerless to revive or extend the lease which will have expired and terminated by virtue of tenant's breach of a conditional limitation without cure, within the time fixed in the landlord's notice.

In addressing Authentic's fourth and fifth arguments -- that the Termination Letter was technically deficient and improperly vague -- it should be kept in mind that the Fayolle Trustee has not sought the Court's assistance to obtain possession of the Building from Authentic. At least since the roof collapsed on August 29, 2002, if not before, Authentic has not been in possession of the Building. Therefore, the detailed and somewhat onerous statutory notice requirements for purposes of a summary proceeding under NY RPAPL § 711 based on the nonpayment of rent do not apply here. *See Ferry Bldg. Co. v. 44 Wall Street Fund, Inc.*, 142 Misc.2d 54, 57, 535 N.Y.S.2d 685, 687 (NY Civ. 1988):

> In the final analysis, what is conclusive to the determination of the jurisdictional question [of whether the tenant is in possession and RPAPL § 711 applies] is whether the petitioner can take complete possession of the premises without need of a summary proceeding. [Citation omitted.] The test is whether a Marshal or other officer of the court would give the landlord nothing under the final order because the premises are wholly vacant and the landlord has the keys.

Instead, this is a proceeding simply to determine whether the Sublease continues to exist or whether the Fayolle Trustee has properly exercised a right reserved in the Sublease to terminate it. *See, e.g., 110-45 Queens Blvd. Garage, Inc. v. Park Briar Owners, Inc.*, 265 A.D.2d 415, 696 N.Y.S.2d 490, 491 (2d Dep't 1999) ("The law permits a commercial landlord to reserve the right" to peaceably "re-enter the commercial premises in issue upon termination of the lease or default in the payment of rent."); *see also Bozewicz v. Nash Metalware Co.*, 284 A.D.2d 288, 725 N.Y.S.2d 671 (2d Dep't 2001); *Jovana Spaghetti House, Inc. v. Heritage Co. of Massena*, 189 A.D.2d 1041, 1042, 592 N.Y.S.2d 879 (3d Dep't 1999); 2 Dolan, Rasch's Landlord & Tenant § 23:38, at 201-02.

In section 17(2) of the Overlease, Authentic waived notice of termination for failure to pay rent, but even if such a waiver were unenforceable, the Termination Letter properly put Authentic on notice of its intention to terminate the Sublease for failure to pay rent. 2 Dolan, Rasch's Landlord & Tenant § 23:38 at 201:

> Basically, an option to terminate a lease can be exercised only by complying with the provision granting it. A notice of termination must be clear, unambiguous, and unequivocal notice of limitation; it must clearly and by its terms provide for the automatic expiration of the leasehold, and convey this fact to the other party.

See also City of Buffalo Urban Renewal Agency v. Lane Bryant Queens, Inc., 90 A.D.2d 976, 456 N.Y.S.2d 568 (4th Dep't 1982), *aff'd* 59 N.Y.2d 825, 451 N.E.2d 501, 464 N.Y.S.2d 754 (1983). The Termination Notice clearly served its intended function. It gave Authentic the effective date and time of termination. It stated why the Sublease was being terminated. And it was consistent with the Fayolle Trustee's right under paragraph 17(2) of the Overlease, as incorporated in the Sublease, to terminate the Sublease for nonpayment of rent. The Fayolle Trustee did not have to specify the amount of rent that Authentic had not paid, as Authentic contends; it was sufficient to put Authentic on notice that the Trustee was terminating the Sublease because Authentic had failed to pay rent under paragraph 5 of the Sublease, a default that continues to this day, a year later, Authentic not having paid *any* monthly rent. Nor did the Fayolle Trustee have the obligation under the Sublease to provide Authentic with the right to cure the rent defaults, as Authentic argues; indeed, if the Trustee had offered a cure option to Authentic, the Termination Notice might not have been effective. *See* 2 Dolan, Rasch's Landlord & Tenant § 23:38, at 201 (notice to cure a default cannot be deemed a termination notice).

Authentic's last argument -- that Anchor's refusal to consent to the alterations to the Building proposed by Authentic and its designee excuses Authentic's failure to pay rent -- also is unavailing. To resolve this issue it is not necessary to decide whether Anchor has improperly withheld consent. Even if Anchor improperly withheld consent, Authentic, as subtenant, was not in privity with Anchor, as overlandlord; Authentic, therefore, had no claim against Anchor. *Full House Foods, Inc. v. 33rd Street Enters. (In re Full House Foods, Inc.)*, 279 B.R. 71, 76-7 (Bankr. S.D.N.Y. 2002);1 Dolan, Rasch Landlord & Tenant § 9.53, at 385. Further, the Sublease has no provision excusing Authentic's performance if Anchor breached such a provision of the Overlease. Indeed, paragraph 11 the Sublease provides, to the contrary, that Authentic shall make no alterations or improvements to the Building without any required consent by Anchor. n9 Thus, while Anchor had not duty to Authentic, Authentic had a duty to the Fayolle Trustee to obtain Anchor's consent.

Moreover, paragraph 7 of the Sublease contains the following exculpation of the Fayolle Trustee in the event of Anchor's breach of the Overlease:

> Under no circumstances whatsoever shall Sublessor be liable to Sublessee for any failure of Overlessor to provide any service or otherwise perform, observe or comply with Overlessor's obligations under the Overlease, but Sublessor agrees to use reasonable efforts to cause Overlessor to comply with the Overlease. n10

Construing similar exculpatory language, *Full House Foods* held that the overlandlord's breach of the overlease would not excuse the subtenant's rent default under the sublease. 279 B.R. at 77-8. Therefore, even if Anchor improperly withheld its consent to the proposed alterations to the Building, an issue not here determined, Authentic would not have been excused thereby from performing its obligations under the Sublease.

Conclusion

Authentic's motion for summary judgment is DENIED, and defendants' request for summary judgment is GRANTED, as set forth herein.

It is SO ORDERED.

Dated: September 2, 2003

/s/ Robert D. Drain

United States Bankruptcy Judge

Footnotes

n1 The Fayolle Trustee also was appointed chapter 11 trustee of Riverbank.

n2 Neither Authentic nor any other Fayolle-controlled entity owns the hansom cab horses stabled in the Aristocratic Premises. Either Aristocratic or another Fayolle-controlled entity has some relationship with the owners of the hansom cab horses stabled in the Aristocratic Premises, but the nature of that relationship is unclear and irrelevant to the present motions.

n3 Thereafter, Anchor has consistently withheld its consent to the alterations to the Building proposed by Authentic or its designee.

n4 Judge Bohanon determined that because the Pacific Circle transaction had not closed, the Fayolle Trustee had never assumed the Overlease; therefore, the Court's reference to "cure" in the August 28, 2002 bench ruling was not for purposes of section 365(b)(1)(A) of the Bankruptcy Code but, rather, with reference to section 365(d)(3) of the Bankruptcy Code, which requires the timely performance of a lease of real property that has not yet been assumed or rejected, and section 362(d)(1) of the Bankruptcy Code, requiring relief from the automatic stay for cause.

n5 Given the foregoing, it is unnecessary to determine whether the other condition to Authentic's right to receive the $ 25,000 failed. The parties dispute whether Authentic vacated the Aristocratic Premises within the time specified by paragraph 4(b) of the Hudson Settlement Agreement, an issue that is somewhat complicated because (a) the Aristocratic Trustee permitted Authentic to remain at those Premises after the closing of the Pacific Circle transaction was delayed and then cancelled, yet he reserved his rights with respect to Authentic's breach of paragraph 4(b) for having failed to leave the Aristocratic Premises before such date, (b) Authentic contends it timely vacated the Premises by posting a notice to that effect, (c) orders were thereafter issued requiring Authentic to vacate the Premises by a date certain, and (d) Authentic nevertheless has remained at the Aristocratic Premises at the sufferance of the owner.

n6 Paragraph 25(a) of the February 5 Order provides that the "Trustees may withdraw from escrow and pay to Authentic $ 75,000 (the "Post-Petition Indebtedness") from the Down Payment in accordance with the terms and conditions of the [Hudson] Settlement Agreement." Under paragraph 25(b) of the February 5 Order, this loan from Pacific Circle's security deposit was given superpriority status under section 364(c) of the Bankruptcy Code, to be repaid, presumably, from the proceeds of the Pacific Circle transaction. The Trustees never borrowed from the security deposit, however, to pay Authentic for application under paragraph 4(a) of the Hudson River Settlement Agreement.

n7 Authentic, moreover, had breached its obligation under paragraph 5 of the Hudson Settlement Agreement to pay $ 20,000 toward postpetition arrears under the Overlease.

n8 The Sublease created no privity of contract between Authentic and Anchor. 1 Dolan, Rasch's Landlord & Tenant § 9:53 (4th ed. 2002), at 385. "Therefore, the subtenant's liability is only to his sublessor, and on all the covenants contained in the sublease." *Id.* § 9.54 at 386.

n9 Authentic has pointed to paragraph 16 of the Sublease, which provides that "Sublessee shall, without the necessity of obtaining Sublessor's consent, have the right to license or otherwise contract for or agree to allow occupancy of portions of the [Building] for the boarding or stabling of carriage horses and storing or garaging of equipment," to contend that Anchor's withholding of consent clearly was wrongful. However, this provision applies only to the Fayolle Trustee and, moreover, does not deal with alternations to the

Building, which are specifically addressed by paragraph 11 of the Sublease.

n10 There has been no contention that the Fayolle Trustee failed to use reasonable efforts to cause Anchor to comply with the Overlease.

Filed 3/31/05
Nos. 05-0511-bk (L); 05-0672-bk (CON)
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE JOHN B. FAYOLLE

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the plaintiff-appellant Authentic Hansom Cabs, LTD.,. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.